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BOARD OF PERSONNEL APPEALS

No. 14653

IN THE SUPREME COURT OF THE STATE OF MONTANA

1979

ULP-17-1975

BOARD OF TRUSTEES OF BILLINGS SCHOOL DISTRICT NO. 2 of Yellowstone County, Montana,

Petitioner,

-vs-

STATE OF MONTANA ex rel BOARD OF PERSONNEL APPEALS AND BILLINGS EDUCATION ASSOCIATION, a Montana non-profit corporation,

Respondent.

Appeal from: District Court of the Thirteenth Judicial District, Honorable Robert H. Wilson, Judge presiding.

Counsel of Record:

For Petitioner:

Longan & Holmstrom, Billings, Montana
James Capser argued, Billings, Montana

For Respondent:

Hooks and Budewitz, Townsend, Montana
Patrick F. Hooks argued, Townsend, Montana
Hilley and Loring, Great Falls, Montana
Emilie Loring argued, Great Falls, Montana
Jerry Painter, Helena, Montana

Submitted: September 21, 1979

Decided: OCT 24 1979

Filed:

OCT 24 [illegible]

Thomas J. Kearney
Clerk

Mr. Chief Justice Frank I. Haswell delivered the Opinion of the Court.

The Board of Trustees of Billings School District No. 2 appeals from the order of the Yellowstone County District Court denying the School District's petition to modify the order of the Board of Personnel Appeals. The BPA's order determined that District No. 2 had committed an unfair labor practice by coercing its teachers to surrender their right to strike.

The BPA's order stated in part that the District shall not issue individual contracts which include terms of employment not yet adopted in a master agreement. The District staunchly defends its right to issue individual contracts to teachers after contract negotiations have reached an impasse, and it fears that the BPA order, if upheld, will interfere with its ability to keep its schools operating when no agreement on a master contract can be reached. Our decision does not concern the District's right to issue individual contracts prior to adoption of a master agreement. We are concerned here with the issuance of individual teacher contracts during the pendency of a lawful strike and hold only that under the facts of this case the District's use of individual contracts to terminate the strike was an unfair labor practice under section 59-1605(1)(a), R.C.M. 1947.

During the first ten months of 1975, appellant District and respondent Billings Educational Association attempted to negotiate a new contract for District teachers. Negotiations were unsuccessful and District schools opened in the fall of 1975 with the teachers working without a contract. On October 2, 1975, the teachers went on strike. Three days later, the District's final offer was rejected and BPA mediators withdrew. With negotiations having ceased, the District mailed a letter with an attached contract to each of its teachers. Each letter stated that the teacher would be replaced unless his or her contract was signed and returned

by October 14, 1975, and he or she returned to work by October 15, 1975.

On October 10, 1975, BEA filed a complaint with the BPA in which it alleged the District had violated section 59-1605(1)(a)(e), R.C.M. 1947, of the Collective Bargaining Act by its refusal to bargain. In addition BEA's brief contended that the District had coerced teachers by mailing them letters containing a threat of discharge. After conducting a hearing on the charges, a BPA hearing examiner concluded that the District had violated section 59-1605(1)(e) by refusing to bargain, but that the complaint failed to give the District fair notice of the charge of coercion, and thus he could not consider that charge.

The BPA adopted the examiner's finding that the District had refused to bargain, and in addition, concluded that the District had attempted to coerce its teachers into signing contracts and returning to work, thereby interfering with their right to engage in concerted activities including the right to strike.

The District petitioned the Yellowstone County District Court to modify the BPA's order insofar as it ordered the District to cease using individual contracts providing for wages, hours, fringe benefits, or other conditions of employment. The District Court denied the petition and this appeal followed.

The sole issue is whether the District Court committed reversible error in affirming BPA's decision that the mailing of individual contracts was an unfair labor practice under the facts of this case.

NOTICE

The District contends that BEA's complaint failed to give notice of the charge of coercion; that the evidence presented at the hearing before the BPA's trial examiner does not support the conclusion that the District coerced its teachers; and that section 75-6102, R.C.M. 1947, authorizes the District to issue

individual teacher contracts containing terms of employment not already adopted in a master agreement.

The first issue presented by defendant is whether BEA's complaint complied with the requirements of notice for administrative hearings. Section 82-4209(1), R.C.M. 1947, of the Montana Administrative Procedure Act provides that a party to a contested case shall be given an opportunity for a hearing after reasonable notice. Reasonable notice includes "a short and plain statement of the matters asserted." Section 82-4209(2)(d), R.C.M. 1947. The District maintains that it did not receive reasonable notice of the charge of coercion because the complaint did not state that the District had "coerced" its teachers, and did not allege facts which would support such a charge.

The importance of pleadings in administrative proceedings lies in the notice they impart to affected parties of the issues to be litigated at the hearing. Western Bank of Billings v. Mont. St. Banking (1977), ____Mont.____, 570 P.2d 1115/ 34 St.Rep. 1197; Davis, Administrative Law Text, (3rd ed. 1972), §8.02, pp. 196-197; Greco v. State Police Merit Board (Ill. C.A. 1969), 105 Ill.App.2d 186, 245 N.E.2d 99, 101. Thus the pleadings are liberally construed to determine whether the charged parties were given fair notice. 73 C.J.S. §120, p. 439; Greco, supra; Glenn v. Board of County Com'rs, Sheridan County (Wyo. 1968), 440 P.2d 1, 4. Fair notice is given if a charged party having read the pleadings should have been aware of the issues which it had to defend. N.L.R.B. v. Johnson (6th Cir. 1963), 322 F.2d 216, 220. See also, Glenn, supra; Deel Motors, Inc. v. Department of Commerce (Fla. C.A. 1971), 252 So.2d 389.

We hold that the District received fair notice that the charge of coercion would be litigated. The complaint charged coercion when it stated that the District had violated section 59-1605(1)(a)(e), R.C.M. 1947. Section 59-1605(1)(a), prohibits

coercion of employees in the exercise of certain rights protected by the Collective Bargaining Act. Among those rights is the right to strike.

The complaint also alleged facts to support the charge of coercion as it stated the District was "attempting to force the teachers to give up legally protected rights." In the same context, the complaint stated that public employees have the right to strike.

The word "coercion" is not a talisman without which the complaint fails. The allegations stated in the complaint were sufficient to inform the District that the issue of coercion would be litigated. If the District still had doubts about whether coercion was an issue, upon request it could have obtained a more definite statement of the charges. See section 82-4209(2)(d), R.C.M. 1947.

MERITS

The District contends that the BPA's finding that it coercively used individual contracts is clearly erroneous in view of the evidence presented by the entire record. Due to the similarity in the provisions of the National Labor Relations Act and Montana's Collective Bargaining Act concerning this issue, it is appropriate to consider federal cases in interpreting the prohibition against coercion contained in section 59-1605(1)(a), R.C.M. 1947. See Local 2390 of Amer. Fed., Etc. v. City of Billings (1976), 171 Mont. 20, 555 P.2d 507.

Federal cases have established the right of an employer to inform striking employees of his intent to permanently replace nonreturning workers after a specified date. N.L.R.B. v. Robinson (6th Cir. 1958), 251 F.2d 639; N.L.R.B. v. Bradley Washfountain Co. (7th Cir. 1951), 192 F.2d 144, 152-154. The District contends that the individual contracts and attached letters simply informed its striking teachers of what the District had a legal right to do,

namely to replace teachers who refused to return to work after October 15, 1975.

The facts of this case do not support the District's contention. An employer's right to communicate his intent to replace striking workers is not absolute. If the employer's communication is an attempt to interfere with his employees right to engage in concerted activities, then he has committed an unfair labor practice. National Labor Rel. Bd. v. Beaver Meadow Creamery (3rd Cir. 1954), 215 F.2d 247; Cusano v. National Labor Relations Board (3rd Cir. 1951), 190 F.2d 898; See also N.L.R.B. v. D'Armigene Inc. (2nd Cir. 1965), 353 F.2d 406; N.L.R.B. v. Power Equipment Company (6th Cir. 1963), 313 F.2d 438.

The chairman of District No. 2's Board of Trustees testified at the hearing before the trial examiner that the District's letter to its teachers included a deadline because "it was time to bring the strike to a halt if we could." The District's failure to hire replacement teachers after the deadline passed suggests that the District's primary motivation was to halt the strike rather than to keep its schools open. See Dayton Food Fair Stores, Inc. v. N.L.R.B. (6th Cir. 1968), 399 F.2d 153. The BPA's finding that the District coerced its teachers to surrender their right to strike is amply supported by the record.

We note in passing that in resolving this issue, we are dealing with a lawful strike. Union activities that become violent and threaten the public safety are not protected by the constitutional right to free speech or provisions for collective bargaining. 51A C.J.S. §289, p. 67; Clark v. State (Okla. C.C.A. 1962), 370 P.2d 46; Smith v. Grady (5th Cir. 1969), 411 F.2d 181; Stevens v. Horne (Fla. C.A. 1976), 325 So.2d 459. See also, Great Northern Ry. Co. v. Local G.F.L. of I.A. of M. (D.Mont. 1922), 283 F. 557.

IWC Contracts The District's final contention is that State ex rel. BEA

v. District Court (1974), 166 Mont. 1, 531 P.2d 685, and section 75-6102, R.C.M. 1947, authorize the issuance of individual teacher contracts even though a master contract has not been adopted.

In State ex rel. BEA, this Court held that nothing in the Professional Negotiations Act for Teachers (formerly section 75-6115 through 75-6128, R.C.M. 1947) required District No. 2 to adopt a master agreement with BEA before issuing individual teacher contracts. In 1975, the legislature repealed the Professional Negotiations Act and placed teachers under the Collective Bargaining Act. State ex rel. BEA did not concern a charge of coercion or interpret the teachers' rights under the Collective Bargaining Act to participate in strikes. It is not relevant to the present dispute.

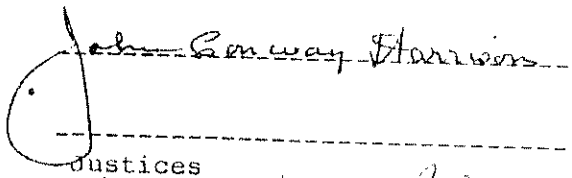
Section 75-6102, R.C.M. 1947, requires teachers to be employed by contract. The District contends that the legislature's failure to repeal section 75-6102, R.C.M. 1947, after placing teachers under the Collective Bargaining Act demonstrates the legislature's intent to authorize the issuance of individual contracts after negotiations on a master contract have reached an impasse.

This argument also misses the point. Whether the District can issue individual contracts after an impasse in negotiations has occurred is not the issue here. This decision concerns only the District's use of individual contracts as leverage to end its teachers' participation in a lawful strike.

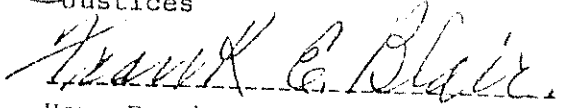
Affirmed.

Frank I. Haswell
Chief Justice

We concur:



Justices



Hon. Frank E. Blair, District Judge, sitting in place of Mr. Justice John C. Sheehy.

Mr. Justice Daniel J. Shea dissents and will file a written dissent later.

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF BILLINGS EDUCATION ASSOCIATION, ASSOCIATED WITH MONTANA EDUCATION ASSOCIATION,	)	
Complainant,	)	ULP #17, 1975.
vs-	)	FINAL ORDER
SCHOOL DISTRICT #2, BILLINGS HIGH SCHOOL DISTRICT,	)	
Defendant.	)	

* *

On February 2, 1976, a hearing on the above-entitled unfair labor practice was held before Mr. Neil E. Ugrin, Hearing Examiner appointed by this Board. On August 6, 1976, Mr. Ugrin issued his FINDINGS OF FACT AND CONCLUSIONS OF LAW AND PROPOSED ORDER. Exceptions were taken by both parties to Mr. Ugrin's Order. Oral arguments were held before the entire Board on September 21, 1976. After hearing the oral arguments, reviewing the briefs submitted by both parties and the entire record, the following is our final order:

EXCEPTIONS

1. Both parties excepted to the Hearing Examiner's award of one day's pay in his proposed remedy. Complainant excepted that it was an inadequate remedy. Defendant argued that it was a punitive remedy, and beyond the authority of this Board. Further, Defendant excepted to the one day's pay as not being warranted since the hearing examiner found that the unfair labor practice occurred on October 11, 1975, which was a Saturday, and the teachers did not have any money coming for that day.

2. Complainant takes issue with the Hearing Examiner's Finding that there was impasse.

3. Complainant further excepts to the refusal of the Hearing Examiner to consider the coercive effects of the defendants' issuance of the contract together with "what amounted to threats to discharge striking teachers who did not sign the contracts."

4. Defendant excepted to the Hearing Examiner's Finding that Defendant committed an unfair labor practice on October 11, 1975, by failure to bargain with the complainant.

We will address each one of the Exceptions separately.

DECISION.

I.

Complainant argues that the evidence does not support a finding of impasse. This Board considers that to be an evidentiary decision. The Hearing Examiner who was present at the hearing can best evaluate the testimony to make that determination. After reviewing the record, we find testimony that will support the Hearing Examiner's findings that the parties were at an impasse. We therefore affirm that portion of the Hearing Examiner's decision finding impasse and adopt his findings in support thereof as those of this Board.

II.

Defendant excepted to the Hearing Examiner's Conclusion that Defendant committed an unfair labor practice on October 11, 1975, by refusing to bargain with the Complainant. Defendant argues that the mediator from this Board called and requested that they not meet with the teachers until he arrived October 13. The Hearing Examiner was not impressed by that argument. There was no evidence taken at the hearing which would contradict the findings of the Hearing Examiner. For that reason, this Board denies the exceptions taken by Defendant to the Hearing Examiner's Conclusion that they committed an unfair labor practice on October 11, 1975, and adopts the findings of the Hearing Examiner in support thereof as being those of this Board.

III.

Both parties have excepted to the Hearing Examiner's award of one day's pay in his proposed remedy. Defendant's exception is twofold. First, it excepts because the award is punitive in nature. Secondly, the Defendant excepts to the Hearing Examiner's award of one day's pay because the particular day involved is a Saturday, and a day on which the teachers were on strike, and therefore, they did not have a day's pay coming.

In reviewing this question it should be noted that the National Labor Relations Act's language concerning remedies for unfair labor practices [Sec 10(c)] is almost identical to section 59-1607(2), the section of the

Montana Public Employees Collective Bargaining Act. It is for that reason we turn to the interpretation of section 10(c) of the NLRA as guidance for the interpretation of our own act.

The United States Supreme Court in Consolidated Edison Co. vs N.L.R.B. (1938), 305 U.S. 197, 3 LRRM 646, 655 discussing the power of the N.L.R.B. under section 10(c) of the N.L.R.A. stated:

> "That section [10 (c)] authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act'. We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."
>
> "The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violation and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act."

In N.L.R.B. vs Douglas & Lomis & Co., (8th 1971) 443 F.2d, 291, 295, 77 LRRM 2449, 2451, stated:

> "It should be kept in mind that one of the prime purposes of the Board's remedy, in order to effectuate the policies of the Act, is to rectify the harm which may have resulted to the employees and, therefore, the remedy should not 'smack' of punitive action against the employer." Citing Local 57, International Ladies' Garment Workers' Union v. N.L.R.B. 374 F. 2d 295, 300, 64 LRRM 2159 (D.C. Cir.) cert. denied 387 U.S. 942 (1967), cert. denied 395 U.S. 980, 65 LRRM. 2441 (1969).

It is therefore the interpretation of the United States Supreme Court that the language of section 10 (c) does not give the N.L.R.B. punitive powers. We

find that the same interpretation is applicable to our statute, 59-1607 (2). We therefore reverse the Hearing Examiner's award of one day's pay to the Complainants as being outside the authority of this Board to make such an award on a punitive basis.

This, however, does not answer the question of whether or not this Board desires to make such an award on the basis that it would "effectuate the policies of this Act." Defendant argues that no such award should be made because the teachers were on strike on October 11, 1975, and further, October 11 and 12 were Saturday and Sunday respectively, and the teachers therefore had no pay coming. Since there was no finding by the Hearing Examiner that the unfair labor practice committed by the Defendant prolonged the negotiations, and there is no evidence in the record which would support such an assertion, we find Defendant's argument has merit. Therefore, this Board finds that our Order requiring a reward of back pay is not warranted in this situation.

IV.

The final exception to the Hearing Examiner's decision is that of the individual contracts. Complainant contends that the issuance of the individual contracts was an unfair labor practice both because it was individual bargaining, and because it was coercive in nature and thereby used to deny the teachers of their right to engage in concerted activities which has been defined by the Montana Supreme Court to include the right to strike.

In order for this Board to properly address the question it becomes necessary for this Board to interpret the statutes involved, and basically outline the statutory history involved.

When the Public Employee Collective Bargaining Act was originally passed by the 1973 Legislature, teachers were not included. They remained under the Professional Negotiation Act for Teachers, 75-6115 thru 75-6128. The 1975 Legislature repealed the Professional Negotiation Act for Teachers and placed the teachers under the Public Employee Collective Bargaining Act. [See: 1975 Session Laws, section 1 and 2, chapter 117.] Since there were no exceptions enacted by the Legislature, it is obvious that the intent of the Legislature in placing the teachers under the Public Employee Collective Bargaining Act,

was that they were to be treated equally with the rest of the public employees.

The Legislature failed, however, to repeal section 75-6102, which provides for individual contracts for teachers. No other group of public employees has that requirement. It is fundamental principle of statutory interpretation that when interpreting statutes they must be interpreted, if possible, so that they are not conflicting. Therefore, in interpreting the action of the Legislature of placing the teachers under the Public Employee Collective Bargaining Act which gives public employees the right to bargain collectively and to engage in other concerted activities, along with 75-6102 requiring the issuance of individual contracts it becomes obvious that the intention of the Legislature was not to allow the substitution of individual contracts for that of the master agreement.

In fact, it becomes obvious that the function of the individual contract has been relegated to nothing more than a document stating the intention of the teachers to teach in the public school system for the academic year. Any interpretation giving the individual contract anymore efficacy would be in conflict with the teachers' right to collectively bargain and would therefore be repugnant to section 59-1603, which gives the teachers the right to collectively bargain. It was never intended by the Legislature, that the individual contract was to be substituted for the master contract. So they must be kept totally separate. The master contract deals with wages, hours, and other conditions of employment; the individual contract deals only with the individual teacher's intent to return to the district and teach for the upcoming year.

The question then becomes was the issuance of the contracts at the time they were issued coercive in nature? That is, did the Defendant attempt to coerce the teachers into signing the contract and returning to work and thus deprive them of their right to engage in other concerted activities which includes the right to strike? The Hearing Examiner refused to decide the question. We find it necessary to answer the question. And we answer it in the affirmative.

The Defendant, issued the individual contracts during the height of the strike. Not only did they issue the contracts during the strike, but clause (6) of the contract read as follows:

"(6) This contract offer will remain in effect until 2:00 o'clock p.m., October 14, 1975, at which time said offer will become null and void. Upon execution and delivery of the contract to the District (101 10th Street West, Billings, Montana, 59102), and approved by the Board, and your return to your regular duties on or before October 15, 1975, before 8:00 a.m., the contract will then be in full force and effect." (emphasis ours).

What the contract in essence says is, "sign it and return to work or you are out of a job." It is required by law that the contract be signed, and to place the condition that the teacher either return to work or the contract is void, is coercive. The Defendant did not have the right to place that condition in the contract when the district knew the teachers were on strike. Through that contract, the Defendant attempted to coerce the teachers into returning to work and thus giving up their right to strike.

The Montana Supreme Court has specifically upheld the right of public employees to engage in strikes or other concerted activities. [See: Dept. of Highways vs. Public Employees Craft Council, 32 St. Rptr. 932, 529 P. 2d 785.] Using the individual contract to attempt to coerce the teachers into giving up their right to strike was an interference with the teachers' rights as stated in 59-1603 (1) and the Defendant therefore is guilty of an unfair labor practice as defined in 59-1605 (1) (a). We are not stating that the school district had no right to replace the striking teachers. We are stating that the school district has no right to discharge the teachers and thereby to interfere with the teachers' right to strike. This decision is in line with the decision of the private sector. [See: NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345-346, 2 LRRM 610; and NLRB v. United States Cold Storage Corp., 203 F. 924, 32 LRRM 2024 (CA 5), cert. denied, 346 U.S. 818, 32 LRRM 2750.]

V.

Finally, we adopt all findings and conclusions of law of the Hearing Examiner and the rationale therefor, not contradictory to this final order.

O R D E R

We feel compelled that any Order this Board issues shall be in agreement with the Strike Settlement Agreement reached by both parties and which is now Appendix D of the 1975-76 Agreement between both parties.

IT IS THEREFORE ORDERED:

1. The Defendant shall cease and desist from refusing to bargain with Complainant upon receiving reasonable notice of the demand for bargaining.

2. The Defendant shall cease and desist from including in individual contracts issued to teachers any matters concerning wages, hours, fringe benefits, and other conditions of employment which have not been agreed to in a master agreement. Further, Defendant shall cease and desist from using individual contracts to interfere with the teachers' rights as guaranteed them by 59-1603.

Dated this 3rd day of November, 1976.

BOARD OF PERSONNEL APPEALS

By Brent Cromley
Brent Cromley
Chairman

CERTIFICATE OF MAILING

I, Trenna Scoffield, hereby certify and state that I did on the 3rd day of November, 1976, mail a true and correct copy of the Final Order of the Board of Personnel Appeals in the matter of ULP#17, 1975, to the following:

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Trenna Scoffield
Trenna Scoffield

BEFORE THE BOARD OF PERSONNEL APPEALS

STATE OF MONTANA

IN THE MATTER OF BILLINGS EDUCATION ASSOCIATION, ASSOCIATED WITH MONTANA EDUCATION ASSOCIATION, Complainant, -v- SCHOOL DISTRICT #2, BILLINGS HIGH SCHOOL DISTRICT, Defendant.	ULP-17-1975 FINDINGS OF FACT AND CONCLUSIONS OF LAW AND PROPOSED ORDER

On October 10, 1975 the Board of Personnel Appeals received a complaint containing allegations by the Billings Education Association against School District #2 and Billings High School District. Because of its importance, the complaint is attached to this opinion as Exhibit A. In summary, the complaint charged that the trustees (1) refused to meet, (2) engaged in surface or conditional bargaining and (3) have engaged in individual bargaining with the teachers rather than the exclusive representative. The complaint was not verified on the 10th day of October, 1975 and was verified on October 14, 1975. On October 28, 1975 the School Board answered. On February 2, 1976 a hearing on this unfair labor practice charge was held in Room 119 of the Ramada Inn, Billings, Montana, before Neil E. Ugrin, Hearing Examiner appointed by the Board of Personnel Appeals. The complainant, Billings Education Association (hereinafter BEA) was present and represented by counsel, Mr. Benjamin Hilley of Great Falls, Montana. The defendant School District (hereinafter District) was present as appeared through its counsel Mr. John Davidson of Billings, Montana. Evidence, both oral and written, was presented and your Hearing Examiner now being fully advised in the premises makes the following:

FINDINGS OF FACT

1. That unfair labor practice complaint, Exhibit A, was filed on October 10, 1975 with the Board of Personnel Appeals. The charge was not lodged with the Board until October 14, 1975 because it had not been properly verified. On October 14th a properly verified charge was filed with the Board of Personnel Appeals and was in proper order.

2. From January 22, 1975 to June 6, 1975 the parties met in thirteen face to face bargaining sessions.

3. Acting upon a joint petition the parties met in a mediation session on July 29th and 30th, 1975 with the Board of Personnel Appeals mediatator. The parties further met with the Board of Personnel Appeals mediatator on August 19, 20, and 21, 1975. On October 2, 1975 the BEA went on strike. Beginning October 3 until October 5th the Board of Personnel Appeals established mediatation between the BEA and the District. This mediatation ended on October 5th with the mediatotors declaring that no useful purpose would be served by their further presence, hence the mediatation was terminated. (All dates hereafter are 1975)

4. On October 4th the BEA made an oral offer to the District. On October 4th the offer was refused by the District.

5. On October 4th the District made its "last and final offer" to the BEA.

6. This last offer of the District to the BEA was reduced to writing and given to the BEA on October 5th.

7. On October 5th the BEA either did not respond to or rejected the offer of the District made orally on October 4th and in writing on October 5th.

8. On October 7th the BEA asked the District to meet and negotiate.

9. On October 7th the District responded that they would meet at a mutual acceptable time but indicated that it would be appropriate for the BEA to "first prepare and deliver to us the

complete written proposal in order than an evaluation of your position may be made in order to determine appropriate response and/or whether or not further negotiations will be useful at this time." On October 7th the BEA responded with a letter containing a written proposal. This proposal was the same proposal the BEA made on October 4th, which was rejected by the School Board. On October 8th the District responded that the BEA proposal was not a basis justifying renewal of negotiations but that if the BEA would submit a new proposal it would be given consideration as outlined in the District letter of October 7th (quoted in part above).

10. On October 8th the District offered to implement its order of October and notified the teachers within the School District by mailing individual contracts of employment to them.

11. On October 10th the BEA requested a meeting to negotiate and indicated their proposal contained compromises on the specific items of salary, job security and service fee. On October 11th the District responded to the October 10th BEA letter in the following language: "Please present your new proposal to us in writing. If after review of your new proposal there is an indication of sincere effort on the part of the Association to resume negotiations, the School Board will give directions to their negotiating team on your new proposal."

12. On October 11th the BEA requested another meeting and included a written proposal. On October 11th the trustees acknowledged receipt of the proposal but indicated that they would not meet.

13. During the mediation session in July, the intervening time before the August mediation session, during the August mediation session and during the crises mediation I find that very little progress if any was made in the negotiations.

14. Reviewing all of the items in dispute taken as a whole, I find that the crises mediation literally resolved no problems of significance.

15. On August 11th the BEA communicated to its members that they were "still at impasse" with the School Board. In a reference

to the August 19th, 20th and 21st, 1975 mediation, the BEA referred to the "negotiations impasse between the Association and the School Board. It is no better than the papers had pictured it." On August 25, 1975 the BEA proposed to the District that the fact finding process be suspended and that the "impasse" be referred to federal mediation.

Based on the above findings of fact I draw the following:

CONCLUSIONS OF LAW

I have consolidated charges 1 and 2. I feel that charge 2 is contained within charge 1. I have considered evidence with regard to charge 1 to and through October 11, 1975.

On October 11, 1975 the District committed an unfair labor practice by failure to bargain with the BEA. Throughout their negotiations the District imposed as a condition of bargaining that proposals or written proposals be submitted by the BEA. Under the circumstances prevailing in ULP 11, that is--a total lack of movement by both parties on key issues, the Board of Personnel Appeals found such a requirement not to be an unfair labor practice. They certainly, by their language, discouraged such a policy. Prior to October 11, while the conduct of the District with regard to requiring written proposals may not have been forbidden, under the theory of ULP 11, though certainly not encouraged, when the BEA made it plain in complainant's Exhibit 20 that they would make concessions in specified areas, it then became incumbent upon the District to meet and confer with regard to these proposals. This is of the essence of collective bargaining. Based on the

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1. There was some confusion as to the date of filing this charge. It apparently was presented on October 10, but rejected by the Board of Personnel Appeals because of lack of verification and was lodged as properly verified on October 14. Further, even if the date of filing the charge were October 10, I would find that the activities of October 11 constituted a part of a continuing transaction and were merely a continuation of the preceeding several days activities. I treat the whole sequence starting on October 8 as one, as the United States Supreme Court did in Nat. Licorice Co. v. Nat. Lab. Rel. Board 309 U.S. 350, 84 L. Ed. 813 (1940)

proffered compromise on specific items made in complainant's Exhibit 20 I know of nor can find any authority which would allow the District to "review ... your new proposal (for) indication of sincere effort ... to resume negotiations." See R.C.M. 59-1605 (e)

As far as the issue of proper notice for purpose of preparation is concerned, I would comment that charge 1 is rather specific in that it in essence alleges that on October 8 and since that date, the District has refused to meet. If there was any question as to the scope and nature of the charge, the District could have required the BEA to provide further clarification. See R.C.M. 82-4209.

With regard to charge 3 I conclude that no unfair labor practice has occurred. It is well established law in the private sector that once an impasse is reached an employer may unilaterally implement his last offer to the union so long as he does not go beyond the last offer. See NLRB v. KATZ, 369 US 736 (1962).

Based on the history of bargaining of these parties, particularly the lack of any measurable negotiation progress during the mediations of July and August and the fact finding procedure and given the lack of progress on any of the subsequent issues dividing the parties during the crises mediation of October 3rd through 5th, I conclude that on the date of October 8th, the date the employer set out to implement its last offer, that an impasse then existed. If there were any remaining doubt as to whether an impasse had occurred, it is set to rest by BEA's verified petition. In Section 8 of its petition, the BEA has affirmatively alleged that an impasse existed which is completely consistent with my view of the facts.2

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2. The unfair labor practice committed by the District on October 11 did not bring about or help bring about the impasse which existed on October 8. I, therefore, do not feel that the unfair labor practice committed on October 11 affects the District's right to unilaterally implement its last offer on October 8.

Much is said in BEA's brief about the coercive nature of the letters informing teachers of the District's intent to implement their offer of October 4th. The BEA argues the coercive nature of the letter and the illegality of offers to discharge employees.

I cannot reach a consideration of that issue. The third count of the charge in question, charges the District only with individual bargaining with the teachers and does not get into the area of discrimination, discharge or threats of discharge. The courts have consistently held, even in labor matters, that due process requires adequate notice of the charge alleged. "There is a denial of due process of law when issues are not clearly defined and the employer is not fully advised of them." NLRB v. Bradley Wash Fountain Company, 192 F.2d 144 (1951). See also Consolidated Edison Company of New York v. NLRB, 305 US 197, 59 S.Ct. 206, 83 Lawyers Ed. 126. I find that the charge by the BEA is narrowly drawn to encompass only the charge of individual bargaining and cannot be construed as to give fair notice of the issues of threats of discharge and coercion.

PROPOSED REMEDY

My observation of these negotiations is that both parties have been guilty of near-bad-faith from time to time. Typical of this conduct would be the BEA reoffering on October 7 in written form the same proposal that had been rejected by the District on October 4 when presented orally by the BEA. There are many such examples.

I would not adopt in this case the blanket back pay order often used in the private sector but rather judging this case on its individual merits order the District to pay to the teachers, through the BEA, one days pay. Anything less would be a meaningless hand slap. Anything more would not take into account the role of the BEA in creating many of the problems about which it now complains.

DATED this 4th day of August, 1976.

NEIL E. UGRIN, Hearing Examiner

CERTIFICATE OF MAILING

I, NEIL E. UGRIN, the Hearing Examiner for the Board of Personnel Appeals in the foregoing action, do hereby certify that I have on this 9th day of August, 1976, served the foregoing Findings of Fact and Conclusions of Law and Proposed Order by depositing a copy thereof in the United States mails at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon, addressed as follows:

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